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No. 99-262

In the Supreme Court of the United States

ANKER ENERGY CORPORATION, ET AL., PETITIONERS

v.

UNITED MINE WORKERS OF AMERICA COMBINED BENEFIT FUND, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE COMMISSIONER OF SOCIAL SECURITY IN OPPOSITION

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QUESTION PRESENTED

Whether the provisions of the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. 9701 *et seq.*, that assign responsibility for funding the health-care benefits of retired coal miners and their dependents to the coal mine operators that previously employed the miners pursuant to collective bargaining agreements that promised the miners health-care benefits for life violate the Due Process or Just Compensation Clause of the Fifth Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-40a) is reported at 177 F.3d 161. The opinions of the district court (Pet. App. 41a-50a, 51a-73a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 14, 1999. The petition for a writ of certiorari was filed on August 12, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Coal Industry Retiree Health Benefit Act of 1992 (Coal Act or Act), 26 U.S.C. 9701 *et seq.*, to address a crisis in the funding of two multi-employer welfare benefit plans that paid for the health-care benefits of coal miners, retired miners, and their dependents. Those multi-employer plans, the United Mine Workers of America 1950 Benefit Plan and Trust (1950 Benefit Trust) and the United Mine Workers of America 1974 Benefit Plan and Trust (1974 Benefit Trust), were created and funded through a series of national collective bargaining agreements, known as National Bituminous Coal Wage Agreements (NBCWAs), between the United Mine Workers of America (UMWA) and the Bituminous Coal Operators Association (BCOA). See generally *Eastern Enters.* v. *Apfel*, 524 U.S. 498, 505-509 (1998) (plurality opinion). The NBCWAs covered members of the BCOA that employed miners, as well as other coal mine operators who, although not members of the BCOA, nonetheless agreed to be bound by the terms of the NBCWAs in "me too agreements." See Pet. App. 10a.

Before 1974, a single multi-employer fund was the exclusive source of pension and health-care benefits for UMWA miners, retirees, and their dependents. See *Eastern*, 524 U.S. at 505-506 (plurality opinion). In the 1974 NBCWA, the UMWA and the BCOA agreed to separate that fund into two multi-employer pension funds and two multi-employer welfare benefit funds. Under the 1974 NBCWA, the 1950 Benefit Trust provided health-care benefits to miners who retired before 1976, and the 1974 Benefit Trust provided health-care benefits to both the active work force and miners who retired in 1976 or thereafter. *Id.* at 509 (plurality

opinion). Unlike previous agreements, the 1974 NBCWA expressly stated that miners and their spouses would be entitled to health-care benefits for life. *Id.* at 510 (plurality opinion); see also Pet. App. 6a; *In re Chateaugay Corp.*, 53 F.3d 478, 482 (2d Cir.), cert. denied, 516 U.S. 913 (1995).

The structure of the 1950 and 1974 Benefit Trusts was changed in the 1978 NBCWA. In that agreement, employers that were bound by the NBCWA agreed to provide benefits to their active employees and future retirees through individual employer health plans, rather than the 1974 Benefit Trust. The 1974 Benefit Trust was retained to provide health-care benefits to post-1975 "orphaned" retirees, whose last employer had gone out of business. See *Eastern*, 524 U.S. at 510 (plurality opinion). The 1950 Benefit Trust for miners who retired before 1976 (and their dependents) was also retained. See *id.* at 511 (plurality opinion). The 1978 NBCWA, like the previous one, expressly promised that miners covered by the agreement would receive health-care benefits for life. See *Chateaugay*, 53 F.3d at 482.

In the 1980s, the financial stability of the 1950 and 1974 Benefit Trusts was plagued by spiraling health-care costs, the phenomenon of coal operators "dumping" their retirees into the 1974 Benefit Trust by terminating their individual welfare benefit plans or leaving the coal business, and judicial decisions maintaining the trusts' beneficiary population without corresponding increases in coal operator contributions. The withdrawal of coal operators from the 1950 and 1974 Benefit Trusts forced the remaining participating employers to shoulder increasingly large contribution obligations to pay for not only their own retirees, but also newly "orphaned" retirees whose employers had ceased

contributing to the Trusts. Those rising costs, in turn, influenced some still-contributing signatory operators to withdraw from the Trusts, thus further shrinking the trust fund contribution base. See *Eastern*, 524 U.S. at 511 (plurality opinion). The Trusts' ability to provide health-care benefits was jeopardized, and the issue of retiree health-care benefits contributed to a protracted strike at the Pittston Coal Company. *Ibid.* (plurality opinion).

2. In 1990, the Secretary of Labor established the Advisory Commission on United Mine Workers of America Retiree Health Benefits (Coal Commission) to examine the financial crisis confronting the Trusts and to recommend solutions. See *Eastern*, 524 U.S. at 511-512 (plurality opinion). As relevant here, the Coal Commission recommended, as one alternative solution, that current and past signatories to the NBCWAs should bear the cost of providing health-care benefits to "orphaned" retirees whose former employers were no longer in the coal business, as well as to their own retirees. See *id.* at 512-513 (plurality opinion). The Coal Act was based in large part on that alternative recommendation by the Coal Commission. See *id.* at 513-514 (plurality opinion); 138 Cong. Rec. 5331 (1992) (statement of Sen. Wofford).

The Coal Act was designed to provide stable financing for the health-care benefits of all retired coal miners and their dependents who were covered by either the 1950 or 1974 Benefit Trust, or by an individual employer plan under the NBCWAs. To that end, the Coal Act created two new, private multi-employer health-care benefit trusts. The first new fund, the United Mine Workers of America Combined Fund (Combined Fund), the trust at issue in *Eastern*, was created by the statutory merger of the 1950 and 1974 Benefit Trusts.

It provides benefits to beneficiaries who were receiving (and were eligible to receive) benefits from those Trusts as of July 1992. See 26 U.S.C. 9702.[1]

The Coal Act provides that health-care benefits from the Combined Fund shall be financed through annual premiums paid by "signatory operators." The Act defines a "signatory operator" to be a person "which is or was a signatory to a coal wage agreement." 26 U.S.C. 9701(c)(1). The term "coal wage agreement" includes both the NBCWAs and the "me too agreements." See 26 U.S.C. 9701(b)(1). Any "related person" to a signatory operator is jointly and severally liable for the signatory operator's premiums. See 26 U.S.C. 9701(c)(2)(A), 9704(a).

The amount of the premiums is determined by the Commissioner of Social Security under a three-tier formula established by the Coal Act. 26 U.S.C. 9706(a). Under that formula, the Commissioner is to assign responsibility for the benefits of a retired miner, if possible, to a signatory operator that "employ[ed]" the retiree in the coal industry under a 1978 or subsequent wage agreement (or any related person to such a signatory operator). See 26 U.S.C. 9706(a)(1)(B) and (2)(B).

The Coal Act directs the creation of the Combined Fund as a private multi-employer benefit plan, and the appointment of its trustees. 26 U.S.C. 9702(a). The Act further provides that the Combined Fund shall have the same legal status as any other private multi-employer welfare benefit plan under the Labor Management Relations Act of 1947 and the Employee Retirement Income Security Act of 1974. 26 U.S.C.

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[1] The Coal Act also established another fund, the 1992 UMWA Benefit Plan, which is not at issue here. See 26 U.S.C. 9712.

9702(a)(3); see 29 U.S.C. 186(c)(5); 29 U.S.C. 1002(1) and (37).

3. From 1967 until 1982, petitioner King Knob Coal Co. and Consolidation Coal Company[2] were parties to a series of contracts under which King Knob agreed to extract coal on properties owned or controlled by Consolidation. Pet. App. 9a. In those contracts, King Knob agreed that "all parties working for it in connection with the undertaking covered by this Agreement shall be its [King Knob's] employees." *Id.* at 28a. King Knob also agreed that "its employees shall be members of the United Mine Workers of America and it shall be a signatory to the then current [NBCWA]." *Id.* at 9a-10a. King Knob signed "me too" agreements during the 1970s and early 1980s; the last collective bargaining agreement executed by King Knob was a "me too" agreement in 1984. *Id.* at 10a.

During the course of the contractual relationship between King Knob and Consolidation, King Knob was acquired by an affiliate of petitioner Anker Energy Corporation in 1975. Pet. App. 10a. Thereafter, in 1982, the contract mining agreements between Consolidation and King Knob were terminated, and a settlement agreement between Consolidation and King Knob provided that Consolidation would reimburse King Knob for certain subsequent payments "due to the

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[2] Consolidation Coal Company was a defendant in the district court and appellee in the court of appeals. Although the decision of the court of appeals was in part adverse to Consolidation (see Pet. App. 33a-34a), Consolidation has not filed a petition for a writ of certiorari seeking review of any part of the court of appeals' decision. Petitioners have informed the Court that Consolidation does not intend to participate in the proceedings in this Court. See Pet. ii.

UMWA Fund or any successor fund" to finance miners' health-care benefits. *Ibid.*

In 1994 and 1995, the Commissioner of Social Security notified petitioner Anker Energy Corporation that it had been assigned liability for a number of beneficiaries under the Coal Act as a "related person" to King Knob. Pet. App. 10a. Anker objected to those assignments on the ground that they should have been made to Consolidation because Consolidation owned the mine where King Knob's employees worked, had made payments to the Benefit Trusts to cover the health-care expenses of King Knob's employees, and had agreed in the 1982 settlement agreement to assume continued financial liability for the health-care expenses of those employees. The Commissioner rejected those objections, emphasizing that the retired miners in question were employed by King Knob:

> Under the Coal Act, ownership of a mine is immaterial to assignment decisions. Assignments are made solely on the basis of the signatory employer who employed the eligible retiree. In the case involving King Knob, an affiliate of Anker Energy, the signatory that employed the retirees was King Knob, not Consol[idation]. Also, for Coal Act purposes, SSA is not bound by any private agreements made between companies, nor does the Coal Act allow for pro-ration of premium payments between companies. In light of the foregoing, no assignments that were made to Anker on the basis of its relationship to King Knob Coal can be reassigned to Consol[idation].

Id. at 26a (citation omitted).

4. Petitioners initiated this action in district court against the Commissioner, the Combined Fund, and

Consolidation to contest Anker's liability for the beneficiaries assigned to it as a related person to King Knob. Petitioners contended that the assignments should have been made to Consolidation, that Consolidation was contractually obligated to reimburse them for any liability to the Combined Fund, and that the assignment of beneficiaries to Anker violated the Due Process and Just Compensation Clauses of the Fifth Amendment. Pet. App. 11a.

In July 1997, the district court granted Consolidation judgment on the pleadings, dismissing petitioners' claim that the assignments should have been made to Consolidation, Pet. App. 67a, as well as their claim that Consolidation was required to reimburse Anker for payments to the Combined Fund, *id.* at 68a. In March 1998, before this Court decided *Eastern*, the district court rejected petitioners' constitutional challenges, and granted summary judgment for respondents. *Id.* at 45a. In July 1998, the court entered judgment for respondents Combined Fund and its Trustees on their counterclaims seeking premiums, interest, liquidated damages, attorney's fees, and costs. *Id.* at 13a.

5. While this case was still before the district court, a divided Court held in *Eastern Enterprises* v. *Apfel* that the Coal Act was unconstitutional as applied to a coal mine operator that signed NBCWAs in effect between 1947 and 1964, but ceased coal mining operations in 1965. See 524 U.S. at 516-517 (plurality opinion) (recounting history of Eastern's involvement in the coal business). The Coal Act obligated Eastern to pay premiums to the Combined Fund to cover the health benefits of more than 1000 retired miners or their dependents who had worked for the company before 1966. *Id.* at 517 (plurality opinion). Eastern contended that the Coal Act violated substantive due process as

applied to it and effected an unconstitutional taking of its property without just compensation by retroactively creating an obligation to finance the benefits of miners who, when employed by Eastern, had no expectation that they would receive open-ended health-care benefits at Eastern's expense.

The plurality concluded that the application of the Coal Act to Eastern effected an unconstitutional taking without just compensation. See *Eastern*, 524 U.S. at 524-527. Applying the Court's three-factor test for analyzing regulatory taking claims (*id.* at 523-524), the plurality found a constitutional problem as to each factor. In particular, the plurality found it significant that the Coal Act imposed liability on Eastern for lifetime health-care benefits even though Eastern had withdrawn from the coal industry before any of the NBCWAs had promised lifetime benefits to the miners. See *id.* at 532 (with respect to the burden placed on Eastern, noting that Eastern "had no control over the activities of its former employees subsequent to its departure from the coal industry in 1965"); *ibid.* (with respect to investment-backed expectations, stressing that Eastern never participated in an industry-wide agreement creating expectations of lifetime benefits); *id.* at 537 (with respect to the nature of the governmental action at stake, stating that "Eastern cannot be forced to bear the expense of lifetime health benefits for miners based on its activities decades before those benefits were promised").

Justice Kennedy, concurring in the judgment and dissenting in part, disagreed with the plurality's conclusion that the Coal Act should be analyzed as a taking, see *Eastern*, 524 U.S. at 539-547, but concluded that the application of the Coal Act to Eastern violated "[a]ccepted principles" of substantive due process in-

hibiting the operation of severely retroactive laws, *id.* at 547- 550. Justice Kennedy noted that "the imposition of liability on former employers based on past employment relationships" may be upheld under due process principles as remedial legislation designed to allocate properly the costs of the employer's business. *Id.* at 549. He concluded, however, that the Coal Act did not serve that purpose as applied to Eastern because, although "Eastern was once in the coal business and employed many of the beneficiaries, * * * it was not responsible for their expectation of lifetime health benefits or for the perilous financial condition of the 1950 and 1974 plans which put the benefits in jeopardy. * * * [T]he expectation was created by promises and agreements made long after Eastern left the coal business." *Id.* at 550.

Four Justices dissented, concluding that the Coal Act, as applied to Eastern, was not unconstitutional under either due process or taking principles. *Eastern*, 524 U.S. at 553-568. The four dissenting Justices agreed with Justice Kennedy that the Coal Act should not be analyzed as a taking at all. *Id.* at 554-557.

6. After this Court's decision in *Eastern*, the court of appeals affirmed the judgment of the district court in part and reversed in part. Pet. App. 1a-40a. The court held that the Coal Act is constitutional as applied to petitioners. *Id.* at 25a. In reaching that decision, the court followed in large part its analysis in *Unity Real Estate Co.* v. *Hudson*, 178 F.3d 649 (3d Cir. 1999), petition for cert. pending, No. 99-12, in which the same constitutional claims were rejected. See Pet. App. 9a, 17a, 22a-25a.

First, the court observed that the concurrence in *Eastern* did not rest on a "narrower" ground of decision than that of the plurality opinion, and so neither de-

cision could be taken as constituting the "controlling holding" of *Eastern*. Pet. App. 17a. Therefore, the court concluded, *Eastern* requires "a finding that the Coal Act is unconstitutional as applied to [petitioners] * * * only if [petitioners] stand[] in a substantially identical position to Eastern Enterprises with respect to both the plurality and Justice Kennedy's concurrence." *Ibid.* (internal quotation marks omitted).

The court then noted that *Eastern* involved a mine operator that had not signed either the 1974 or a subsequent NBCWA, whereas King Knob, the signatory operator in this case, had agreed to be bound by NBCWAs in 1974 and afterwards. Pet. App. 17a. "[The] plurality and concurrence [in *Eastern*] both found significant the fact that Eastern Enterprises was not a signatory to either the 1974 or 1978 NBCWAs, and thus it did not contemplate either being responsible for or contributing to the miners' expectation of lifetime benefits." *Ibid.* In light of both the taking analysis applied by the plurality in *Eastern* and the due process analysis undertaken by Justice Kennedy in that case, the court concluded, "a majority of the Court would find the Act unconstitutional when applied to an employer that did not agree to the 1974 or subsequent NBCWAs, while application of the Act to a signatory to the 1974 or a subsequent wage agreement would be an entirely different matter." *Id.* at 21a. Following its earlier decision in *Unity* as well as the D.C. Circuit's decision in *Association of Bituminous Contractors, Inc.* v. *Apfel*, 156 F.3d 1246 (1998), the court then held the Coal Act's application to Anker constitutional. Pet. App. 21a-22a.

The court also explained that its opinion in *Unity* directed it "to apply an additional level of due process analysis designed to measure the extent of the gap

between the coal companies' contractual promises to the Funds and the requirements of the Coal Act." Pet. App. 22a (internal quotation marks omitted). Under that analysis, the court concluded that the duration of the Coal Act's retroactive operation does not render its application to Anker violative of due process. *Id.* at 23a. The court observed that the extent of the retroactive application of the Act in this case is no greater than it was in *Unity* (there, 11 years). *Ibid.* Further, Anker's liability under the Coal Act is proportional to the experience of King Knob (its related party) with the earlier system of financing coal miners' benefits, because King Knob was a signatory to the 1978 and subsequent NBCWAs and therefore bears some of the responsibility for creating miners' reasonable expectation of lifetime health-care benefits as well as the problems of underfunding that the Coal Act redresses. *Id.* at 24a- 25a. Concluding finally that "nothing germane to our holding in [*Unity*] distinguishes Anker from the plaintiffs in [*Unity*]," the court held the Act constitutional as applied to petitioners "because of the factual distinction that makes *Eastern Enterprises* inapplicable, and because the case falls squarely under [the] analysis and holding in [*Unity*]." *Id.* at 25a.[3]

The court reversed, however, the district court's decision to dismiss Consolidation as a defendant to petitioners' suit, and remanded for further proceedings on petitioners' claims against Consolidation. Pet. App. 29a-35a. The court concluded that the district court had erred in ruling on the pleadings that the settlement

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[3] The court also affirmed the district court's decisions upholding the assignment of beneficiaries to Anker, Pet. App. 25a-29a, and the award of interest, liquidated damages, attorney's fees, and costs to the Combined Fund, *id.* at 35a-36a.

agreement between King Knob and Consolidation could not have obligated Consolidation to reimburse petitioners for their financial liability to the Combined Fund. *Id.* at 31a-32a. The court also rejected the district court's conclusion that the Coal Act voided private contractual arrangements for indemnification or reimbursement of liability for health-care benefits entered into before the Act was passed. *Id.* at 32a-34a. The court ruled that, while the Coal Act does assign initial responsibility for Coal Act premiums to the "signatory operators," as defined by the Act, it does not prohibit private contractual agreements whereby those signatory operators may seek recompense for those premiums from other entities. *Id.* at 34a-35a.

ARGUMENT

1. Petitioners contend (Pet. 17-21) that the obligations imposed on them under the Coal Act to finance the health-care benefits of their former employees (and those employees' dependents) violate the Due Process and Just Compensation Clauses of the Fifth Amendment. They contend, in particular, that the court of appeals' decision conflicts with *Eastern Enterprises* v. *Apfel*, 524 U.S. 498 (1998), which held the Coal Act unconstitutional as applied to the coal mine operator that challenged the Act in that case. Those contentions are without merit. Petitioners' situation is fundamentally different from the position of the coal operator before the Court in *Eastern*. Unlike that operator, petitioner King Knob (for whom petitioner Anker is also responsible as a related party) signed collective bargaining agreements in 1974, 1978, and 1981, that promised its employees health-care benefits for life. The decision below therefore creates no inconsistency with *Eastern*.

The decision of the court of appeals in this case, following its similar decision in *Unity Real Estate* v. *Hudson*, 178 F.3d 649 (3d Cir. 1999), petition for cert. pending, No. 99-12, is also correct under well-settled taking and substantive due process principles, and it does not conflict with any decision of any other court of appeals. To the contrary, the only other court of appeals that has considered a constitutional challenge to the Coal Act since *Eastern* by companies that were bound by the 1974 and 1978 NBCWAs has rejected that challenge, see *Association of Bituminous Contractors, Inc.* v. *Apfel*, 156 F.3d 1246, 1253-1258 (D.C. Cir. 1998), based on a reading of the plurality and concurring opinions in *Eastern* that largely parallels that of the Third Circuit in this case and in *Unity*. Further, this Court recently denied review in another case from the District of Columbia Circuit presenting the same challenges to the Coal Act. See *Holland* v. *Robert Coal Co.*, 172 F.3d 919 (D.C. Cir. 1998) (Table), cert. denied, 119 S. Ct. 1803 (1999). There is no basis in this case for a different result. Further review is therefore not warranted.

a. Although the Court in *Eastern* did not arrive at a single rationale for finding the Coal Act unconstitutional as applied to Eastern, both opinions supporting the judgment in that case emphasized the fact that Eastern left the coal industry before any collective bargaining agreement gave miners an expectation of lifetime health-care benefits. See 524 U.S. at 530-531, 532, 535-536 (plurality opinion); *id.* at 549-550 (opinion of Kennedy, J.). This case, by contrast, presents a factual situation in which the signatory operator agreed to be bound by NBCWAs promising its employees lifetime benefits. Thus, as the court of appeals concluded, "the fact that [King Knob] was a signatory to 'me too'

agreements from the 1970s until 1984 distinguishes [petitioners'] situation from that of Eastern Enterprises." Pet. App. 21a. The result reached by the Court in *Eastern* therefore does not govern here. To the contrary, as the court of appeals observed in *Unity*, "[b]ecause [petitioners] signed NBCWAs in 1974 and thereafter, they are factually distinguishable from [*Eastern*]. Language in the plurality and the concurrence suggesting that expectations fundamentally changed after 1974 supports [that] conclusion." *Unity*, 178 F.3d at 659; see also *Association of Bituminous Contractors*, 156 F.3d at 1257 ("the clear implication of each opinion in *Eastern Enterprises* is that employer participation in the 1974 and 1978 agreements represents a sufficient amount of past conduct to justify the retroactive imposition of Coal Act liability.").[4]

b. Petitioners' further contention (Pet. 17-20) that the court of appeals failed to apply the "retroactivity analysis" supposedly endorsed by five Justices in *Eastern* is without merit. Petitioners submit (Pet. 17) that that analysis requires that "retroactive employee benefits legislation is unconstitutional if it imposes a substantial economic burden on employers which is based on conduct 'far in the past' that is 'unrelated to any commitment that the employers made or to any injury they caused.'" Contrary to petitioners' contention, the court of appeals, following its retroactivity analysis in *Unity*, see Pet. App. 22a- 23a, correctly

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[4] Moreover, while the Coal Act required Eastern to begin paying premiums to the Combined Fund in 1993, even though the company had not contributed to the United Mine Workers Benefit Plans since 1965, the Coal Act requires petitioners to finance the health benefits of retirees who were covered by King Knob until 1984. See p. 6, *supra*; cf. *Eastern*, 524 U.S. at 516 (plurality opinion).

concluded that the retroactive scope of the Act, as applied to petitioners, is not beyond Congress's legislative power. *Id.* at 23a.

Thus, the court of appeals, following *Unity* and this Court's decisions in *Eastern* and in *Connolly* v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986), properly examined the proportionality of the burden imposed by the Coal Act on petitioners and sustained that burden as permissible. Pet. App. 24a. As the court of appeals noted here, in *Unity* the court "found that the Coal Act imposes a burden justified by both the industry's conduct that created reasonable expectations of lifetime benefits * * * and conduct that created the problem of underfunding." *Id.* at 23a. The court then ruled that the "proportionality analysis in [*Unity*] applies full force here because King Knob was a signatory to the 1978 and subsequent NBCWAs, and thus bears the same responsibility as the plaintiffs in [*Unity*] for creating the reasonable expectations and the problem of under-funding that the Coal Act redresses." *Id.* at 24a. The imposition of liability on petitioners, therefore, can hardly be considered "not related to any commitment they have ever made" (Pet. 19).[5]

The court of appeals also correctly concluded that the extent of retroactivity present in this case is not so

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[5] Nor is it relevant, as petitioners contend (Pet. 19), that Consolidation, rather than King Knob, was responsible for making payments to the Benefit Trusts to finance miners' health-care benefits. The crucial point is that King Knob agreed to be bound by the 1974 and later NBCWAs, including their express promises of lifetime benefits, and therefore participated in the creation of the miners' reasonable expectation of such benefits. Even if Consolidation was the party responsible for directly paying the Trusts for the miners' benefits, that cost was presumably reflected in the contract price negotiated between King Knob and Consolidation.

extreme as to contravene substantive due process. Pet. App. 24a. The court observed that, in *Unity*, the court had found 11 years' retroactive operation to be "acceptable." *Ibid.* Similarly, the court properly found the extent of retroactivity here to be acceptable; the Coal Act took effect only 11 years after King Knob agreed to be bound by an NBCWA in a contract with Consolidation and only eight years after King Knob signed a "me too" agreement. *Ibid.* As the court of appeals noted in *Unity*, this Court has held that "Congress may retroactively bar employers from giving their employees vested pensions in multiemployer plans and then leaving those plans to collapse." *Unity*, 178 F.3d at 671. Furthermore, in contrast to Eastern, petitioners here participated in the creation of a reasonable expectation of lifetime benefits and left the benefit plans in a condition vulnerable to collapse. Accordingly, the periods of retroactivity applicable to the conduct of petitioners survive constitutional scrutiny.

Finally, in *Unity*, the court of appeals properly found that the Coal Act was an appropriate congressional response to commitments participated in by petitioners, and was designed to remedy injuries caused by companies that withdrew from the coal industry, leaving "orphaned" miners and their dependents without provision for adequate funding to meet the expectation of lifetime benefits. 178 F.3d at 674. That particular point was not expressly addressed in the decision below in this case, but in any event petitioners' attempt to rely on *Eastern* to counter that conclusion (Pet. 19) is misplaced. The injuries that the Coal Act is intended to remedy are not physical harms suffered in "employment in mines," *ibid.*; rather, as the court of appeals observed in *Unity*, they are the harms caused by "dumping" retirees on benefit Funds whose funding

structures were vulnerable to such behavior. 178 F.3d at 674.

2. Petitioners contend (Pet. 21-23) that the court of appeals incorrectly applied *Marks* v. *United States*, 430 U.S. 188 (1977), by failing to give "import to the points of agreement between the *Eastern* plurality and the concurrence." Pet. 22. That contention is without merit.

Marks addresses the situation where a concurring opinion in this Court reaches the same result as that reached by a plurality of the Justices, but on narrower grounds. In that situation, a lower court should follow the reasoning of the concurring opinion, because the lower court may conclude that a majority of this Court agrees with the narrower position reached by the concurrence. 430 U.S. at 193. To the extent that *Marks* provides any guidance here, it supports the court of appeals' rejection of petitioners' due process challenge. Even though the plurality and concurrence in *Eastern* analyzed that case under different legal frameworks, those opinions agreed on the constitutional significance of a particular fact, namely, that Eastern left the coal industry before 1974, when the NBCWAs began expressly stating that retired miners would receive health benefits for life. As we have explained, both the plurality and Justice Kennedy concluded that the crucial constitutional problem in *Eastern* was the Coal Act's application to an operator that had never signed a wage agreement promising lifetime benefits, and both found that situation distinguishable from the one where an operator had signed such an agreement. See pp. 8-10, *supra*. The court of appeals properly focused on that point of agreement between the plurality and Justice Kennedy in *Eastern* to reject petitioners' due process claim.

Petitioners also err in arguing (Pet. 23) that the court of appeals improperly "created a majority out of the concurrence and dissent and, thus, established as the law of the case the position taken by the *Eastern* dissent" to reject their taking claim. That argument overlooks the reliance of both the plurality in *Eastern* and the court of appeals in *Unity* (and consequently in this case as well, where the court followed its earlier decision in *Unity*) on *Connolly*, including the three-part taking analysis of *Connolly*, in evaluating the constitutionality of the Coal Act as applied to petitioners. See *Eastern*, 524 U.S. at 529-532 (plurality opinion); *Unity*, 178 F.3d at 657-658, 661, 663-665, 671-673, 677. Moreover, although in *Unity* the court of appeals analyzed this case principally under the rubric of substantive due process, it observed that "[t]o the extent that *Eastern* embodies principles capable of broader application, * * * due process analysis encompasses the relevant concerns." *Id.* at 659.

Thus, rather than giving legal effect to the agreement between the concurrence and the dissent, as petitioners contend (Pet. 22), the court of appeals effectively applied the analytical scheme of the plurality in *Eastern* to the facts of this case. For the reasons given above, petitioners' claims fail even under the reasoning of the plurality opinion in *Eastern*, which emphasized that Eastern—unlike petitioners herein and other coal companies that signed the 1974 and later NBCWAs—never contributed towards any reasonable expectation of lifetime health benefits on the part of coal miners. The plurality opinion and Justice Kennedy's concurrence therefore form a majority sufficient to reject petitioners' taking claim, and it is not necessary to rely on the dissenting opinion in *Eastern* (although it is at least doubtful that *Marks* even ad-

dresses a situation such as the explicit agreement of the four dissenting Justices in *Eastern* with a concurring Justice's rejection of a particular constitutional claim).

3. Finally, petitioners contend that review is warranted because there is now no "framework" for analyzing retroactive legislation other than the Coal Act. Pet. 23. That contention provides no basis for review in this case. The plurality and concurring opinions in *Eastern* identified the same critical characteristics that distinguished the operators that signed NBCWAs in 1974 and afterwards from those that did not, and both opinions found the connection of the latter group of operators to miners' expectation of lifetime benefits and the financial instability of the funds too attenuated to sustain the Act as applied to those operators. In view of that articulation of general agreement on the principles governing the constitutionality of the Coal Act in particular--principles that were followed by the court of appeals in this case and in the D.C. Circuit's decision in *Association of Bituminous Contractors*, *supra*--there is no basis for further review in a Coal Act case in order to address issues that might arise in *other* contexts in the future.

Petitioners incorrectly suggest that the Court's emphasis in *Eastern* on the fact that retroactivity is "generally disfavored" (Pet. 24) constitutes a significant departure from the Court's previous substantive due process decisions according a heavy presumption of constitutionality to legislation (including retroactive legislation) that adjusts the burdens and benefits of economic life. To the contrary, the plurality opinion in *Eastern* emphasized the Court's long-standing "concerns about using the Due Process Clause to invalidate economic legislation," 524 U.S. at 537, and avoided resting its decision on the Due Process Clause. Justice

Kennedy's concurrence did rely on due process principles, but that opinion did not discard the well-settled presumption of constitutionality for regulatory statutes; rather, Justice Kennedy found that presumption rebutted on the particular facts of the case in *Eastern*, which he considered to be a "rare instance[]" of "egregious * * * circumstances." *Id.* at 550. For the reasons we have given, this case presents no comparable circumstances.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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